DRAFT FOR COMMENT

MODEL POLICY ON PUBLIC ACCESS TO COURT RECORDS

Draft dated February 22, 2002

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the Conference of State Court Administrators
by

"Model Policy on Public Access to Court Records Comment Page" at
http://www.courtaccess.org/modelpolicy

Comments to modelpolicy@ncsc.dni.us by 4/15/2002

Project funded by

SJI State Justice Institute

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INTRODUCTION

Historically court files have been open to anyone willing to come down to the courthouse and examine the files. The reason that court files are open is to allow the public to observe and monitor the judiciary and the cases it hears, to find out the status of parties to cases, for example dissolution of marriage, or to find out final judgments in cases. Technological innovations have resulted in more court records being available in electronic form and have allowed easier and wider access to the records that have always been available in the courthouse. Information in court records can now be "broadcast" by being made available through the Internet. Information in electronic records can be easily compiled in new ways. An entire database can be copied and distributed to others. At the same time not all courts have the same resources or the same level of technology, resulting in varying levels of access to records across courts in the same state. These new circumstances require new access policies to address the concern that the proper balance is maintained between public access, personal privacy, and public safety, while maintaining the integrity of the judicial process. In order to provide guidance to state judiciaries and local courts in this area, and to provide consistency of access across a state, a model policy on access to court records has been developed.

The model policy proposed here is based on the following premises:

- Retain the traditional policy that court records are generally open to public access;
- As a general rule access should not vary depending upon whether the court record is in paper or electronic form. Access should be the same regardless of the form of the record, although the manner of access may vary for different forms of the record;
- The nature of the information in some court records is such that remote access to the information in electronic form may be inappropriate, even though public access at the courthouse is maintained;
- The nature of the information in some records is such that public access to the information should be precluded, unless authorized by a judge.

The model policy is organized around the basic questions to be answered by such a policy: What is the purpose of the policy, and who has access to what information, how and when? The policy ends with sections regarding notice about information collected, public education about accessing information, and obligations of the court and vendors providing information technology services to the court.

The objective of the model policy is to assist and guide state or local courts in drafting a policy on public access to court records. The development of a model policy has two main goals. One is to raise the major issues that need to be addressed by such a policy. The second is to provide specific language and terminology as a starting point for drafting a policy specific to a state or local court. This simultaneously avoids the need to start the drafting process from scratch and provides at least one alternative for how to address each of the major issues. A court can begin with the model policy language and adjust it to conform to the state's applicable constitutional provisions, if any, regarding

privacy and an open judiciary and any statutory provisions allowing or restricting access to information.

If a state or court chooses to adopt or revise a rule based on this model policy, the state or court needs to re-examine its access and record keeping laws and policies for all judicial records of any kind or use regarding:

- Case types and categories of information to which public access is restricted, in whole or in part;
- What records, documents or other things are to be filed, lodged or provided to the court to which access is restricted, at least partially;
- What records, documents or other things should not be accepted by the court;
- Rules and practices as to what is considered to be excluded from the court record;
- What personal and financial information is required to be provided on standard forms or pleadings and what specific details are really needed by the court to performs its judicial role;
- Procedures and standards for sealing records, making them confidential, or otherwise restricting public access;
- Records retention schedules; and
- Liability and consequences for releasing restricted information, for providing erroneous or incomplete information derived from court records, or for improperly withholding publicly accessible information.

Some of these issues may already be addressed in existing statutes or rules. Others may be addressed by judicial decisions. Part of the process of considering adoption of a new policy should be a review of the existing laws and decisions and consideration of amending them or incorporating them into the new access policy.

It is also important that a state or court periodically review the access policy to see if changes in public opinion or technology require modifications of the policy.

PURPOSE

Section 1.00 - PURPOSE OF POLICY

(a) The purpose of this policy is to provide a comprehensive policy on public access to court records. The policy provides for access in a manner that:

(1) Provides maximum accessibility to court records,
(2) Supports the role of the judiciary,
(3) Promotes governmental accountability,
(4) Contributes to public safety,
(5) Avoids risk of harm to individuals,
(6) Makes most effective use of court and clerk of court staff,
(7) Provides excellent customer service,
(8) Protects individual privacy rights and interests,
(9) Protects proprietary business information,
(10) Minimizes reluctance to use the court to resolve disputes, and
(11) Does not unduly burden the ongoing business of the judiciary.

(b) The policy is intended to provide guidance to 1) litigants, 2) those seeking access to court records, and 3) judges and court and clerk of court personnel responding to requests for access.

Commentary

The objective of this policy is to provide maximum public accessibility to court records, consistent with a set of public policy interests that are not always fully compatible with unrestricted access. Eleven significant public policy interests are identified. Unrestricted access to all information in court records could result in an unreasonable invasion of personal privacy or unduly increase the risk of harm to individuals and businesses. Denial of access would compromise the judiciary's role in society, inhibit accountability, and endanger public safety. A balance must be found that optimally serves all these interests. The factors are not co-equal, but no one factor overrides all of the others in every circumstance. The balance is influenced by applicable constitutional law or other, specific, statutory provisions.

Subsection (a)(1) Provides Maximum Accessibility to Court Records. The general premise underlying this policy is that court records should generally be open and accessible to the public. Court records have historically been open to public access at the courthouse, with some exceptions. This tradition is continued in the model policy. Open access serves many public purposes. Open access supports the judiciary in fulfilling its role in our democratic form of government and in our society. Open access also promotes the accountability of the judiciary by readily allowing the public to monitor the performance of the judiciary. Other specific benefits are stated in the remaining subsections.

Subsection (a)(2) Supports the Role of the Judiciary. The role of the judiciary is to resolve disputes between private parties or an individual and the government according to a set of rules. Although the dispute is between two people, or with the government, having the process and result open to the public serves a societal interest in having a set of stable, predictable rules governing behavior and conduct. The open nature of court proceedings furthers the goal of providing public education about the results in cases and the evidence supporting them.

The second reason arises from the court's function of establishing rights as between parties in a dispute. The decision of the court stating what the rights and obligations of the parties are is as important to the public as to the litigants. The significance of this role is reflected in statutes and rules creating such things as judgment rolls and party indices with specific public accessibility.

Subsection (a)(3) Promotes Government Accountability. Open court records provide for accountability in at least three major areas: 1) the operations of the judiciary, 2) the operations of other governmental agencies, and 3) the enforcement of laws. Open court records allow the public to monitor the performance of the judiciary and, thereby, hold it accountable. Public access to court records allows anyone to review the proceedings and the decisions of the court, individually, across cases, and across courts, to determine whether the court is meeting its role of protecting the rule of law, and does so in a cost effective manner. Openness also provides accountability for governmental agencies that are parties in court actions, or whose activities are being challenged in a court action. Finally, open court proceedings also demonstrate that laws are being enforced. This includes civil regulatory laws as well as criminal laws.

Subsection (a)(4) Contributes to Public Safety. Access contributes to public safety. Availability of information about court proceedings and outcomes allows people to become aware of and watch out for dangerous people, circumstances or business propositions. Open access to information thus allows people to protect themselves. Examples of this are criminal conviction information and protective order information. Attempts are underway to develop a national registry of protective orders to assist law enforcement, day care providers, etc., in protecting spouses and children who are the subject of protective orders. Similarly there is considerable value in having criminal convictions information available, for example, regarding convicted child molesters that schools and day care providers can check regarding possible new employees.

Subsection (a)(5) Avoids Risk of Harm to Individuals. Other circumstances suggest unrestricted access is not in the public interest. The interest in personal safety can be served by restricting access to information that someone could use to harm someone else, physically, psychologically or economically. Examples include stalking, identity theft based on information obtained from court records, and discrimination against someone based on information obtained from court records.

Subsection (a)(6) Makes Most Effective Use of Court and Clerk of Court Staff. There are also operational impacts related to access. Staff time is required to maintain

and provide access to court records. If records are in electronic form, less staff time may be needed to provide access. However, there can be significant costs to convert records to electronic form in the first place, offsetting any savings from less use of staff time. In implementing public access the court should be mindful of doing it in a way that makes most effective use of court and clerk of court staff.

The design of electronic databases used by the court is also relevant here. The systems should be designed to improve public access to the court record as well as to improve the productivity of the court's employees and judges. What is the added cost of providing both? The answer to this involves allocation of scarce resources as well as system design issues. If the public can help themselves to access, especially electronically, less staff time is needed to respond to requests for access. If the system is designed properly to accommodate restrictions to certain kinds of information without court staff involvement, that is even better.

Subsection (a)(7) Provides Excellent Customer Service. The policy should also support excellent customer service while conserving court resources, particular court staff. Having information in electronic form offers more opportunities for easier, less costly access to anyone interested in the information.

Subsection (a)(8) Protects Individual Privacy Rights and Interests. The major countervailing public interest to open access is the protection of personal privacy. The interest in privacy is promoted by limiting access to certain kinds of information. The typical test regarding privacy involves two considerations: (1) whether the release of information is highly offensive to a reasonable person, and (2) whether the release of the information would serve no legitimate public interest. If the release of information violates both prongs of this test, it ought not to be publicly accessible.

Appropriate respect for individual and business privacy also enhances public trust and confidence in the judiciary.

It is also important to remember that, generally, at least some of the parties in a court case are not in court voluntarily. They have been brought into court by plaintiffs or the government. To that extent they have no choice about whether to participate, they have not consented to personal information related to the dispute being in the public domain. For those who have violated the law or an agreement, civilly or criminally, an argument can be made that they have impliedly consented to participation and disclosure by their actions. However, both civil suits and criminal cases are filed based on allegations, so innocent people and those who have not acted improperly can still find themselves in court as a defendant in a case.

Finally, at times a person who is not a party to the action may be mentioned in the court record. Care should be taken that the privacy rights and interests of such a 'third' person is not unduly compromised by public access to the court record containing information about the person.

Subsection (a)(9) Protects Proprietary Business Information. Another type of information to which access may be restricted is that related to the operations of a business. Trade secrets, customer lists, internal financial information and similar types of proprietary business information ought not become public information by virtue of its relevance in a court case. This could both thwart a legitimate business advantage and give a competitor an unfair business advantage. It also reduces the willingness of a business to use the courts to resolve disputes. Provision must therefore be made to restrict access to this type of information.

Subsection (a)(10) Minimizes Reluctance To Use The Court To Resolve Disputes. The public availability of information in the court record can also affect the decision as to whether to use the court to resolve disputes. A policy that permitted unfettered public access may result in some individuals avoiding the resolution of a dispute through the court because of an unwillingness to have information become accessible to the public by virtue of it being in the court record. This would diminish access to the courts and undermine public confidence in the judiciary. There may also be an unintended effect of encouraging use of alternative dispute resolution mechanisms, which tend to be essentially private proceedings, at least for now. If someone believes the courts are not available to help resolve their dispute, there is also a risk they will resort to self-help, a response the existence of the courts is intended to minimize because of the societal interest in the peaceful resolution of the dispute.

Subsection (a)(11) Does Not Unduly Burden The Ongoing Business Of The Judiciary . Finally, the access policy and its implementation should not unduly burden the court in delivering its fundamental service – resolution of disputes. Depending on the nature of public access, unrestricted access could impinge on the day-to-day operations of the court. This subsection relates more to requests for bulk access (see section 4.40) or for compiled information (see section 4.50) than to the day-to-day, one at a time requests (see section 1.00, subdivision (a)(6). Making information available in electronic form, and making it remotely accessible, requires resources, both staff and equipment. Courts receive a large volume of documents and other materials daily, and converting them to electronic form may be expensive. As is the case with all public institutions courts have limited resources to perform their work. The interest stated in this subsection attempts to recognize that access is not free, that there may be more than one approach to providing, or restricting access, and some approaches are less burdensome than others.

ACCESS BY WHOM

Section 2.00 – WHO HAS ACCESS UNDER THIS POLICY

Every member of the public will have the same access to court records as provided in this policy, except as provided in section 4.50.

"Public" includes:

- **(a) any person and any business or non-profit entity, organization or association;**
- **(b) any governmental agency for which there is no existing policy defining the agency's access to court records;**
- **(c) media organizations; and**
- **(d) entities that gather and disseminate information for whatever reason, and regardless of whether it is done with the intent of making a profit, without distinction as to nature or extent of access.**

"Public" does not include:

- **(e) court or clerk of court employees;**
- **(f) people or entities, private or governmental, who assist the court in providing court services;**
- **(g) public agencies whose access to court records is defined by another statute, rule, order or policy; and**
- **(h) the parties to a case or their lawyers regarding access to the court record in their case.**

Commentary

The point of this section is to explicitly state that access is the same for the general public, the media, and the information industry. Access does not depend on who is seeking access, the reason they want the information or what they are doing with it. The section also indicates what groups of people are not subject to the policy, as there are other policies describing their access.

Subsection (b) and (g): The policy applies to governmental agencies and their staff where there is no existing law specifying access to court records for that agency, for example the health department. If there are applicable access rules, those rules apply.

Subsection (d): This subsection explicitly includes organizations in the information industry, watchdog groups, non-governmental organizations, academic institutions, private investigators, etc.

Subsection (e): Court and clerk of court employees may need greater access to do their work and therefore work under different access rules. Courts should adopt an internal policy regarding court and clerk of court employee access and use of information

in court records. See section 8.30 about the court's obligation to educate its employees about the access policy.

Subsection (f): Employees and subcontractors of entities who provide services to the court or clerk of court, that is, court services that have been "outsourced," may also need greater access to information to do their jobs and therefore operate under a different access policy. See section 7.00 and 8.30 about policies covering staff in entities that are providing services to the court to help the court conduct its business.

Subsection (h): This subsection continues nearly unrestricted access by litigants and their lawyers to information in their own case, but no higher level of access to information in other cases. Note that the model policy does not preclude the court from providing different types of access for parties and their attorneys to their own case, for example remote access, which is not provided to the general public.

ACCESS TO WHAT

Section 3.00 – DEFINITIONS

Section 3.10 - DEFINITION OF "COURT RECORD"

(a) "Court record" includes:

(1) any document, information, or other thing that is collected, received, or maintained by a court or clerk of court in connection with a court case;

(2) any index, calendar, register of action, reporter's notes, order, decree, judgment, minute, and any information in a case management system created by or prepared by the court or clerk of court that is related to a court case; and

(3) any information maintained by the court or clerk of court pertaining to the administration of the court or clerk of court and not associated with any particular case, including internal court policies, memoranda and correspondence, court budget and fiscal records, and other routinely produced administrative records, memos and reports, and meeting minutes.

(b) "Court record" does not include:

(1) records maintained by the clerk of court that are not delivered to the clerk in relation to a court case [Court should identify and list non-court records, for example: land title records, vital statistics, birth records, naturalization records and voter records];

(2) information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which does not become part of the court record as defined in section 3.10 (a) (1).

Commentary

This section defines the court record broadly. Three categories of information to which the access policy applies are identified. First are the documents, etc., that constitute what is classically called the case file. The second category is information that is created by the court, some of which becomes part of the court file, but some resides only in documents or databases that are not in a case file. The third category is information that relates to the operation of the court, but not to a specific case or cases. The definition deals with what is in the record, not whether the information is accessible. Limitations and exclusions to access are provided for in sections 4.20 and 4.30.

The policy is intended to apply to all court records, regardless of the manner in which it was created, the form(s) in which it is stored, or other form(s) in which the information may exist (see section 4.00).

Subsection (a) (1): This definition is meant to be all inclusive of information that is provided to, or made available to, the court that relates to a case. The definition is not limited to information "filed" with the court or "made part of the court record" because some types of information the court needs to make a fully informed decision is not "filed" or technically part of the court record. The language is, therefore, written to include information delivered to, or "lodged" with, the court, even if it is not "filed." An example is the administrative record of the agency whose decision is being reviewed by the court.

The definition is also intended to include exhibits introduced in hearings or trials, even if not admitted into evidence. One issue is with the common practice in many courts of returning exhibits to the parties at the conclusion of the trial, particularly if they were not admitted into evidence. These policies will have to be reviewed in light of an access policy. It may be that this practice should be acknowledged in the access policy, indicating that some exhibits may only be available for public access until returned to the parties as provided by court policy and practice.

The definition includes all information used by a court to make its decision, even if an appellate court subsequently rules that the information should not have been considered or was not relevant to the judicial decision made. In order to be held accountable all of the information that a court considered and which formed the basis of the court's decision must be accessible to the public.

The language is intended to include within its scope materials that are submitted to the court, but upon which a court did not act because the matter was withdrawn or the case was resolved, for example settled, by the parties. Once relevant material has been submitted to the court, it does not become inaccessible because the court did not, in the end, act on the information in the materials because the parties resolved the issue without a court decision.

The definition includes all information that is given to the court, whether or not it could be used by the court to make a decision, or is relevant to the court's judicial making process. There is an issue implicit here that many courts do not now directly address, the exclusion from the record of legally irrelevant material. The court screens the introduction of materials at hearings and trials and generally relies on attorneys to screen materials submitted for filing. However, many cases these days do not an attorney for at least one of the parties, particularly in family law. Clerks generally are instructed not to reject materials offered for filing. As a result there is nothing to prevent someone from making information accessible to the public by "slipping" it into the court record. The wide scale public access possible with electronic records increases the risk of harm to an individual from disclosure, suggesting this issue be re-visited. The troubling issue is who decides whether something offered into the court record is relevant, and therefore to be accepted.

Subsection (a) (2): The definition is written to cover information generated by the court itself that relates to cases. This includes two categories of information. One is

documents, such as minutes, order and judgments, that become part of the court record. The second is information that is gathered, generated or kept for the purpose of managing the court's cases. This information may never be in a document; it may only exist as information in a field of a database such as a case management system, an automated register of actions, or an index of cases or parties.

Subsection (a)(3): The definition of court record includes information and records maintained by the court and clerk of court that is related to the management and administration of the court or the clerk's office, as opposed to a specific case. Subsections 4.30 (g), (h) and (i) provide for restriction of access to drafts and work products related to court administration or clerk's office administration.

Subsection (b)(1): This subsection makes it clear that the policy only applies to information related to court cases. If the clerk of court has responsibilities for other information and records, for example land records, which do not relate to specific court cases, this access policy does not apply to these records.

Subsection (b) (2): The definition excludes information gathered, maintained or stored by other agencies or entities that is not necessary to, or was not part of the basis of, a Court's decision. Access to this data should be governed by the access policy of the agency collecting and maintaining such information. The ability of a computer in a court or clerk's office to access the information because the computer uses shared software and databases should not change the access policy. An example of this is information stored in an integrated criminal justice information system where all data is shared by law enforcement, the prosecutor, the court, defense counsel, and probation and corrections departments. The use of a shared system can blur the distinctions between agency records and court records. Under this section, if the information is provided to the court as part of a case, the court's access rules then apply, regardless of where the information came from. Conversely, if the information is not made part of the court record, the access policy applicable to the agency collecting the data still applies even if the information is stored in a shared database.

Issues Not Addressed in the Policy

Some types of information related to the prosecution of a court case are not covered by this model policy. This includes information exchanged between the parties as part of the litigation, but not delivered to or filed with the court. For example, information exchanged as part of discovery in states where discovery requests and responses are not filed in the court file. If information such as this is exchanged via the court, but not used by the court, the state or local court should consider adding a provision to this section to address whether this information becomes accessible by virtue of it having been in the court's possession during the exchange. Another category of such information is that associated with activity in cases that is not occurring within the judicial sphere, for example alternative dispute resolution (ADR) activities, including "private judging," in pending cases that are pursued by the parties with vendors that are independent of the court. Since the information is not delivered to the court, and does not

form part of the basis of the court's decision, it does not fall within the definition of this section.

Another approach to the problem of the introduction of irrelevant material into the court record is to change, create, or expand the consequences for the introduction, or attempted introduction, of such information. One approach to the issue is to focus on the immunity and liability of people who offer materials into the court record as part of litigation. Currently there is quite broad immunity regarding documents "placed in the record." If immunity was limited, or there was more explicit liability to third parties harmed by placing information into the court record, the record would be less likely to contain extraneous information that might be harmful to any of the interests stated in section 1.00 of this policy. A state or court considering the adoption of an access policy should review relevant state law and suggest changes that are designed to ensure that the court record contains only legally relevant information. Creating or expanding such liability is considered beyond the scope of this policy.

Section 3.20 – DEFINITION OF "PUBLIC ACCESS"

"Public access" means that the public can inspect and obtain a copy of the information in a court record.

Commentary

This section defines "public access" very broadly. The unrestricted language implies that access is not conditioned on the reason access is requested or on prior permission being granted by the court. Access is defined to include the ability to obtain a copy of the information, not just inspect it. The section does not indicate the form of the copy, as there are numerous forms the copy could take, and probably more possible as technology continues to evolve.

At a minimum inspection of the court record can be done at the courthouse where the record is maintained. It can also be done in any other manner determined by the court that makes most effective use of court staff, provides quality customer service and is least disruptive to the operations of the court, consistent with the principles and interests specified in section 1.00. The inspection can be of the physical record or an electronic version of the court record. Access may be over the counter, by fax, by regular mail, by e-mail or by currier. The section does not preclude the court from making inspection possible via electronic means at other sites, or remotely. It also permits a court to satisfy the request to inspect by providing a printed report, computer disk, tape or other storage medium containing the information requested from the court record.

Another aspect of access is the need to redact restricted information in documents before allowing access to the balance of the document (see subsection 4.60(e) and associated commentary). In some circumstances this may be a quite costly. Lack of, or insufficient, resources may present the court with an awkward choice of deciding

between funding normal operations and funding activities related to access to court records. As technology improves it is becoming easier to develop software that allows redaction of pieces of information in documents in electronic form based on "tags" accompanying the information. When software to include such tags in documents becomes available and court systems acquire the capability to use the tags, redaction will become more feasible, allowing the balance of a document to be accessible with little effort on the part of the court.

Section 3.30 – DEFINITION OF "REMOTE ACCESS"

"Remote access" means that inspection can be made without the need to physically visit the courthouse where the court record is maintained.

Commentary

This definition provides a term to be used in the policy that is independent of any particular technology or means of access. Remote access may be accomplished electronically by any one or more of a number of existing technologies, including dedicated terminal, kiosk, dial-in service, Internet site, attaching electronic copies of information to e-mails, etc. Mailing or faxing copies of documents in response to a letter or phone request for information would also constitute remote access under this definition.

Section 3.40 – DEFINITION OF "IN ELECTRONIC FORM"

Information in a court record "in electronic form" includes information that exists as:

(a) electronic representations of text or graphic documents;
(b) an image, including a video image, of a document, exhibit or other thing;
(c) data in the fields or files of an electronic database; or
(d) an audio or video recording of an event or notes in an electronic file from which a transcript of an event can be prepared.

Commentary

The breadth of this definition makes clear the policy applies to information that is available in any type of electronic form. The point of this section is to define what "electronic" means, not to define whether electronic information can be accessed or how it is accessed.

Subsection (a): This subsection refers to electronic versions of textual documents (for example documents produced on a word processor, or stored in some other text format such as PDF format), and pictures, charts, or other graphical representations of information (for example graphics files, spreadsheet files, etc.).

Subsection (b): A document might be electronically available as an image of a paper document produced by microfilming, scanning, or other imaging technique. This document can be viewed on a screen and it appears as a readable document, but it is not searchable without the aid of OCR (optical character recognition) applications that translate the image into a searchable text format. An image may also be one produced through the use of digital cameras, including video, for example in a courtroom as part of an evidence presentation system.

Subsection (c): Courts are increasingly using case management systems, data warehouses or similar tools to maintain data about cases and court activities. The policy applies equally to this information even though it is not produced or available in paper format unless a report containing the information is generated. This section, as well as subsection (a), would also cover files created for, and transmitted through, an electronic filing system for court documents.

Subsection (d): Evidence can be in the form of audio or videotapes of conversations or events. In addition audio and video recording (ER - electronic recording) and computer-aided transcription systems (CAT) are increasingly being used to capture the verbatim record of court hearings and trials. Because this information is in electronic form, this policy would apply to it as well.

Issues Not Addressed in the Policy

The section makes no statement about whether the information in electronic form is the official record, as opposed to, or in addition to, the information in paper form. A state or court considering adoption of an access policy might consider whether there is a need to declare which form, or forms, are deemed official.

Another issue that may arise as more information is available in electronic form has to do with attorney's intellectual property rights in documents they prepare and file. If an attorney has a copyright interest in pleadings, motions and other papers filed with the court, having the information available in electronic form increases the risk of infringement of these rights. What can the attorney do, if anything, to protect the copyright, and what might courts do to minimize infringement of the copyright?

Section 4.00 - APPLICABILITY OF RULE

This policy applies to all court records, regardless of the physical form of the court record, the method of recording the information in the court record or the method of storage of the information in the court record.

Commentary

The objective of this section is to make it clear that the policy applies to information in the court record regardless of the form in which the information was created or submitted to the court, the means of gathering, storing or presenting the information, or the form in which it is maintained. Section 3.10 defines what is considered to be part of the court record. However, the materials that are contained in the court record come from a variety of sources. The materials are offered and kept in a variety of forms. Information in electronic form exists in a variety of formats and databases and can be accessed by a variety of software programs. To support the general principle of open access, the application of the policy must be independent of technology, format and software and, instead, focus on the information itself.

There may be exceptions to the "any form" approach of this section. An example of a possible exception is where an audio or videotape is made of a court proceeding for some reason. If a state has a rule against broadcasting audio or video coverage of trial court proceedings without the consent of the judge or all parties, this section, as written, would permit a person to obtain a copy of the audio or videotape and broadcast the tape, thereby circumventing the rule against audio or video broadcasting of court proceedings. This could be dealt with by excluding such tapes from the definition of "court record," or specifically limiting access in section 4.30.

Overview of Section 4.00 Provisions

Three categories of information accessibility are created in the following sections of the policy. The first reflects the general principle that information in court records is generally presumed to be accessible (section 4.10). The second category addresses information that is in the public domain for only a limited period of time (section 4.20). The third category identifies information that is excluded from public access because of overriding privacy or other concerns (section 4.30). Following these provisions are sections on bulk release of electronic information (section 4.40) and release of compiled information (section 4.50). Having defined what information is accessible and not accessible, there is a section that indicates how to restrict access to information generally accessible, and how to gain access to information generally not accessible (section 4.60). Finally, there is a section that indicates what information should be accessible remotely (section 4.70).

Section 4.10 – GENERAL ACCESS RULE

(a) Information in the court record is accessible to the public except as provided in section 4.20, or restricted by section 4.30 or section 4.60(a).

(b) The existence of information in a court record to which access has been restricted will be publicly accessible.

Commentary

Subsection (a) states the general premise that information in the court record will be publicly accessible unless specifically excluded. There are three exceptions noted. One exception is for information that may be inspected but not copied under section 4.20. The second exception is information in the court record that is specifically excluded from public access by section 4.30. The third exception provides for individual situations where the court orders a part of the record to be restricted from access pursuant to the procedure set forth in section 4.60.

The provision does not require any particular level of access, nor does it require a court to provide access in any particular form, for example, publishing court records in electronic form on a web site or dial-in database. The policy does not require information to be made accessible electronically in a particular form if it is not feasible to do so and to avoid infringing on the authority of the judiciary to spend funds appropriated to it.

Subsection (b) provides a way for the public to know that information exists to which public access is limited or excluded. This allows a member of the public to request access to the excluded record under section 4.60(b), which they would not know to do if the existence of the restricted information was not known. Making the existence of excluded information known enhances the accountability of the court. Hiding the existence of information not only reduces accountability, it also erodes public trust and confidence in the judiciary when the existence of the information becomes known.

In addition to disclosing the existence of information that is not available, there is also a value in indicating how much information is being withheld. For many redactions this could be as simple as using 'placeholders,' such as gray boxes, when characters or numbers are redacted, or indicating how many pages have been excluded if part or all of a document is not accessible. Providing this level of detail about the information contributes to the transparency and credibility of the restriction process and rules.

There are two situations where this policy presents a dilemma. One is where access is restricted to an entire document and the other concerns a case where the entire file is ordered sealed. This section requires the existence of the sealed document or file to be public. The problem arises where the disclosing of the existence of a document or case involving a particular person, as opposed to some of the information in the court record, unduly infringes on the person's privacy or other interest. This section favors disclosure of the existence of the file in the interest of a more open judicial record. A

state or court considering adoption of an access policy may decide to allow a court, using the procedures provided in section 4.60, to decide that even the existence of the information not be made public. This could be readily done by adding an exception clause to the end of this subsection, and specifically allowing the court to restrict access to the existence of information in section 4.60(a).

There may also be technical issues related to this provision. Some automated case management systems now being used by courts may not have the ability to indicate the existence of information without providing some of the very information that is not to be publicly accessible. For example, it may not be possible to indicate that there is a document to which access is restricted without providing too much information about what type of document it is, or what it is about. Other systems may be designed not to indicate the existence of a document that has been sealed, or a case that has been sealed. It may be possible in some systems to add codes for a document or case to which access is restricted. While it may be possible to modify these old systems, it may not be cost effective to do so. Rather, new systems should be designed with these capabilities.

The policy is drafted for adoption either by a state, for the state's judiciary, or by a local court, if the state does not adopt a uniform statewide policy. If a state adopts a policy, in the interest of uniformity the state should consider adding a subsection such as the following to prevent local courts from adopting different policies:

> "(c) A local court may not adopt a more restrictive access policy or otherwise restrict access beyond that provided for in this policy, nor provide greater access than that provided for in this policy."

This not only promotes consistency and predictability across courts, it also furthers equal access to courts and court records.

Issues Not Addressed in the Policy

The policy is silent about keeping track of, or logging, who requests to see court records. Most courts require some form of identification when a physical file is "checked out" from the file room for examination within the courthouse. Most courts do not keep this information once the file is returned. There is no reason to require this sort of identification when someone looks at information in electronic form because they are not removing the physical file form the court's direct control. It can be argued that requiring identification of who has accessed a record could have a chilling effect on access, particularly if the identification information is retained or "logged." After the September 11th attacks an argument can be made in favor of logging those who access certain types of information for public safety or personal security purposes. If a state or court decides to log access requests, they should, at least, inform requestors of the logging activity.

Section 4.20 – COURT RECORDS THAT MAY BE INSPECTED, BUT NOT COPIED

Information that, by statute, rule or other policy, is removed from the court record after a fixed period of time or is converted from public to non-public access after a fixed time period may be inspected, but cannot be copied.

Commentary

This exception is intended to encompass documents or other parts of the court record that are publicly accessible for only a fixed period of time, pursuant to some policy decision embodied in a statute or rule. The provision makes access to the electronic record conform to the access allowed to paper records in terms of what is present and available. For example, in California the presentence report in a criminal case is only publicly accessible for 60 days. After that the report is sealed and not available except by court order. Another example would be a criminal case that is sealed if the defendant successfully completes a diversion program. The subsection prevents information from continuing to be publicly available in electronic form when it is no longer available in paper form.

Some states have statutes or rules that provide for short records retention period for some types of court records, at which time the paper record is to be destroyed. For example, traffic citations are to be destroyed after one year. In order to prevent the electronic record from being out of sync with the paper record, these retention period policies should be reviewed and, possibly revised. If the objective of the short retention policy was simply to eliminate paper in the clerk's office, keeping an electronic copy after the paper record has been destroyed does not violate the policy. If, however, the short retention period also has an objective of clearing people's records of past violations, maintaining an electronic record after the paper record has been destroyed circumvents the policy. If access to the electronic record has existed while the paper record existed, it may be impossible to destroy all copies of the electronic record that have been obtained by, or delivered to, third parties beyond the court's control. Several approaches are possible. One is to have a policy that the electronic record not be accessible to the public for such records. Alternatively, no electronic record would be made in the first place. Another alternative is to establish an obligation on the part of third parties who obtain electronic copies to purge the information at the end of the retention period, with some sort of penalty for failure to do so.

Section 4.30 –COURT RECORDS EXCLUDED FROM PUBLIC ACCESS

The following information in a court record is not accessible to the public:

(a) Information that is not to be accessible to the public pursuant to federal law;

(b) Information that is not to be accessible to the public pursuant to state law;

(c) Financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit cards, first five digits of social security number, or P.I.N. numbers of individuals or business entities;

(d) Proprietary business information such as trade secrets, customer lists, financial information, or business tax returns;

(e) Information reviewed in camera and made confidential by a court order;

(f) Information in the court record relating to a proceeding to which the public does not have access pursuant to law or a court order;

(g) Notes, drafts and work products prepared by a judge or for a judge by court staff or individuals working for the judge related to cases before the court;

(h) Notes, drafts and work products related to court administration and clerk of court information defined in section 3.10 (a) (3);

(i) Personnel and medical records of court employees, information related to pending internal investigations of court personnel or court activities, applicants for positions in the court, information about pending litigation where the court is a party, work product of any attorney or law clerk employed by or representing the judicial branch that is produced in the regular course of business or representation of the judicial branch, court security plans and procedures, cabling and network diagrams and security information related to the court's information technology capabilities, and software used by the court to maintain court records, whether purchased, leased, licensed or developed by or for the court; and

(j) Information constituting trade secrets, copyrighted or patented material or which is otherwise owned by the state or local government and whose release would infringe on the government's proprietary interests.

A member of the public may request the court to allow access to information excluded under this provision as provided for in section 4.60 (b).

Commentary

This section identifies a number of categories of information that may not be accessible to the public for a variety of policy reasons. For certain categories of information an existing statute or rule expresses a policy determination that has already been made by the Legislature or judiciary on a categorical basis; there is no need for a case-by-case analysis. The model policy only describes categories of information to which access might be restricted. In adopting a policy each state or court should go

through the list and identify which categories are applicable in their jurisdiction and what the specific restrictions on access are.

The last paragraph provides a cross-reference to the process and standard for obtaining access to information to which access is restricted pursuant to this section.

Subsection (a): Examples of information that may not be accessible to the public pursuant to federal law include:

- Social Security numbers;
- Federal income or business tax returns;
- Copyright or intellectual property protected by federal law;
- Educational information protected by federal law; and
- Information required to be provided or exchanged by the parties in child support enforcement actions.

Subsection (b): Information that may not be accessible to the public pursuant to state law, legislative or judicially created, generally falls into two categories. First are case types where the entire court record is generally not accessible by the public pursuant to state law (statute, court rule or judicial decision). These may include:

- Juvenile dependency (abuse and neglect) proceedings;
- Termination of parental rights and relinquishment proceedings;
- Adoption proceedings;
- Guardianship proceedings;
- Conservatorship proceedings;
- Mental Health proceedings; and
- Sterilization proceedings.

Second are documents, parts of the court record, or pieces of information (as opposed to the whole case file) that have been declared not accessible. Examples of information in individual cases that are not open to the public pursuant to existing state laws include:

- Name, address or telephone number of a victim, particularly in a sexual assault case or domestic violence case;
- Name, address or telephone number of witnesses in criminal cases;
- Name, address or telephone number of informants in criminal cases;
- Names, addresses or telephone numbers of potential or sworn jurors in a criminal case;
- Juror questionnaires and transcripts of voir dire of prospective jurors;
- Wills deposited with the court for safekeeping;
- Medical or mental health records, including examination, diagnosis, evaluation, or treatment records;
- Psychological evaluations of a party, for example regarding competency to stand trial;
- Child custody evaluations in family law or juvenile dependency (abuse and neglect) actions;

- Description or analysis of a person's DNA or genetic material, or biometric identifiers;
- State income or business tax returns;
- Proprietary business information such as trade secrets, customer lists, financial information, business tax returns, etc.;
- Grand Jury proceedings (at least until the indictment is presented and the defendant is arrested);
- Presentence investigation reports;
- Search warrants (at least prior to the return on the warrant); and
- Arrest warrants (at least prior to the arrest of the person named).

Additional categories of information that a state or court might also consider excluding from general public access include:

- Names and address of children in a juvenile dependency proceeding;
- Names and addresses of children in a dissolution, guardianship, domestic violence, harassment, or protective order proceeding;
- Addresses of litigants in cases;
- Photographs depicting violence, death, or children subjected to abuse;
- Exhibits in trials;
- Applications and supporting documents that contain financial information filed as part of a request to waive court fees or to obtain appointment of counsel at public expense;
- Information gathered or created that is related to the performance, misconduct or discipline of a lawyer (where the judiciary has authority over lawyer admittance and discipline and there are not other provisions covering access to this information);
- Information gathered or created that is related to the performance, misconduct or discipline of a judicial officer (where the judiciary has authority over judicial officer discipline and there are not other provisions covering access to this information); and
- Information gathered or created that is related to alleged misconduct by entities or individuals licensed or regulated by the judiciary.

Subsection (c): This subsection is based on the assumption that while information about the existence and amount of an asset may be relevant to a court decision and therefore publicly accessible, there is no general need to disclose the particular account numbers or means and codes for accessing the accounts. In those instances where the account numbers, or other information included within the definition of this subsection, may be relevant or otherwise possibly subject to public access, access can be requested under section 4.60.

While this policy is easy to state, it is probably the area that is the most difficult to implement. Existing court records already contain large amounts of detailed financial information, particularly in family law and probate proceedings. Court forms often require this information, although it is not clear that the court always needs the details to make its decisions. Many parties, particularly those without legal representation, are not

aware that this information may be accessible to the general public. There is also the problem of a party intentionally including this type of information in a document filed with the court, effectively misusing the court process. A state or court considering adoption of an access policy should review its forms and the information parties are required to provide to minimize the gathering of information to which public access ought not generally be provided. Alternatively the parties could be required to exchange the detailed information, but the forms filed in the court record would only contain summary information.

Subsection (d): This subsection is intended to protect proprietary business information on a categorical basis. Several types of such information are given in the subsection itself. When a state adopts a rule based on this policy, it should consider replacing this subsection with a cross-reference to the statutes that define proprietary information, or reference the standard in case law, so that this policy is consistency with other law in the state about this type of information. An alternative approach would be to leave this sort of information to individual, case-by-case analysis regarding restricting access under section 4.60(a)(3).

Subsection (e): This subsection is necessary to avoid the possibility of providing access under the general rule of the policy where a court order has already made the determination that the information should be kept confidential.

Subsection (f): This subsection is intended to cover situations where information about a particular type of proceeding in a case is not open to the public even though other information in the case is publicly accessible. An example of this is an application by a party to waive fees in a civil case based on indigency, which some are confidential in some states pursuant to statute. Another example would be proceedings in a criminal case relating to the mental competence of the defendant to stand trial.

Subsection (g): Judicial Work Product. This category is intended to exclude public access to work product involved in the court decisional process, as opposed to the decision itself. This would include such things as notes and bench memos prepared by staff attorneys, draft opinions and orders, opinions being circulated between judges, etc. The reference to "individuals working for the judge" is meant to include independent contractors working for a judge or the court, externs, students, and others assisting the judge but who are not employees of the court or the clerk of court's office.

Subsection (h): Court Administration and Clerk of Court Work Product. This exclusion covers information collected, and notes, drafts and other work product generated during the process of developing policy relating to the court's administration of justice and its operations or the operation of the clerk of court. The exception is intended to cover the "deliberative process" but not the final policy, decision or report. In some states the clerk of court function is provided by an executive branch agency, often by an elected clerk. Because the activity concerns the court record, this policy applies to such offices even though they may be part of the executive branch.

Courts should adopt a policy of issuing proposed court administration policies for public comment prior to adoption, except in emergency situations, to obtain public input to its policy development process.

Other Possible Categories of Excluded Information. Other non-case specific information that a court might consider excluding from general public access under this provision (but accessible upon request under section 4.60) might include:

- Logs of arrival and departure times of judges or court staff kept by court security systems;
- Telephone logs of judges and court staff;
- Logs of Internet access by judges and court staff;
- Leave records of judges;
- Minutes of Judges' meetings;
- E-mails of judges and court staff; and
- Personal identifier information about people applying or serving as unpaid volunteers to assist the court, such as serving as a guardian ad litem, court-appointed special advocate for a child, etc.

Subsection (i): Certain Court Administration Records. This subsection provides exclusions for certain categories of information whose release would infringe generally accepted privacy protections for court staff or job applicants, compromise the safety of judges, court staff and those that visit the courthouse, or compromise the integrity of the court's information technology and record keeping systems.

Subsection (j): Proprietary Interest of the government. This subsection is intended to protect information that is the property of a state or local government entity that, if it were owned by a business, would be subject to the protection of the law in subsection (d) above. The intent is to provide the government the same level of protection as is provided to businesses. Examples of information here would be computer software developed by the government, and reports or collections of information that are copyrightable.

The court might also consider limiting remote access to other types of court records. The court might differentiate access to information based on the veracity of the information, for example, limiting remote access to unsworn allegations but allowing general public access at the courthouse, but allowing remote access to sworn declarations and pleadings. For example several states that are considering or adopting access policies are limiting remote access to declarations in family law cases.

Section 4.40 – REQUESTS FOR BULK DISTRIBUTION OF COURT RECORDS IN ELECTRONIC FORM

Bulk distribution is defined as request for all, or a significant subset, of the information in court records that is maintained in electronic form, as is and without modification or compilation.

(a) Bulk distribution of information in the court record in electronic form is permitted for court records that are publicly accessible under section 4.10. Providing for bulk distribution of information in this circumstance will not interfere with the normal operations of the court.

(b) A request for bulk distribution of information not publicly accessible can be made to the court for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes where the identification of specific individuals is ancillary to the purpose of the inquiry. Prior to the release of information pursuant to this subsection the requestor must comply with the provisions of section 4.50(c).

Commentary

This section addresses requests for large volumes of information in court records, as opposed to requesting information form a particular case or reformulated in formation from several cases. The section authorizes bulk distribution for information that is publicly accessible. It also sets out a method of requesting bulk distribution of information to which public access is restricted.

There are advantages to allowing bulk access to court records. Allowing the public to obtain information from court records from a third party may reduce the number of requests to the court for the records. Fewer requests mean less court staff resources devoted to answering inquiries and requests. However, there are costs associated with making the records available in electronic form. There is also the 'cost' of reduced public confidence in the judiciary from the existence of inaccurate, stale or incorrectly linked information available through third parties but derived from court records.

Subsection (a). Bulk transfer is allowed for information that is publicly accessible under this policy. There is no constitutional or other basis for providing greater access to bulk requestors than to the public generally, and this policy states there should be no less access. Implicit in this section is a recognition that information in court records can be combined with information from other sources, even though the linking of information from court records with other information may be used for purposes that are unrelated to why the information was provided to the court in the first place. As noted in section 3.20, public access, including bulk access, is not dependent upon the reason the access is sought or the proposed use of the data.

It is significant to note that transferring information in the court record into databases that are then beyond the court's control creates the very real likelihood that the information will, over time, become incomplete, inaccurate, stale or contain information

that has been removed from the court's records. Keeping information distributed in bulk current may require the court to provide "refreshed" information on a frequent, regular and periodic basis. This may raise issues of availability of court resources to do this. Although creating liability or penalties on the third party information provider (something beyond the scope of this policy) might reduce the risk of stale or incorrect information being distributed, meeting this standard still requires the court to provide updated and new information on a frequent basis.

A particular problem with bulk distribution of criminal conviction information has to do with expungement policies. If the intent of an expungement policy to "erase" a conviction, the public policy may be impossible to implement if the information is already in another database as a result of a bulk transfer of the information. An approach needs to be devised that accommodates expungement and bulk distribution.

Potential mass access to electronic court information highlights the question of the accuracy of the court's records. This is particularly important for databases created by court or clerk of court employees. The potential for bulk distribution of the information in a court database will require courts and clerks to improve both the accuracy of their databases and the timeliness of entering information into them. Policies relating to the internal practices of the court and clerk, in data entry in these cases, are beyond the scope of this policy.

A counter-intuitive aspect of bulk data release has to do with the linking of the information from court records with information from other sources. In order to correctly link court information with information from other sources, the information vendor must have pieces of information that allow accurate matching of court information about someone or an entity with information from other sources. At the same time this type of personal identifier information is often the most sensitive in terms of privacy. Nevertheless, if a court is interested in minimizing the risk of bulk data it provides being incorrectly linked to information from other sources, it should provide more personal identifier information, not less, in those situations where linking is contemplated. Notably, court records often do not contain linking information, for example birth dates or social security numbers, for individuals.

Many states that have considered the bulk data issue have adopted access policies that only allow access to one case at a time, and no bulk data access. This reduces the likelihood of "stale" information existing in databases because a query directed to the court's database, one at a time, will be searching more current court data than a query to a database consisting of a bulk downloaded court information that may not be current, depending upon when the data was transferred. Not providing bulk distribution also eliminates the need to establish mechanisms to provide frequent and regular updates. If a state or court adopts a bulk access policy more restrictive than that in the model policy, it might consider different bulk access rules for different types of information. For example, bulk access might be allowed for indexes, but not for the contents of the case management system or for electronic versions of images of documents filed in cases.

Subsection (b). One reason court records are publicly accessible is to allow the public to monitor the performance of the judiciary. One method of monitoring performance is to examine the information in a set of cases to see whether the court's decisions across cases are consistent, predictable, fair and just. This sort of examination requires access to all information considered by the court in making its decision, as it is difficult to say ahead of time that any piece or category of information is not relevant and therefore should not be made available. Subsection (b) provides a process for obtaining bulk data for information not publicly accessible. The section states that the request for bulk access should be made to the court, i.e., allowing bulk access is a judiciary decision. A state or court that adopts an access policy should provide more detail about where and to whom a request should be delivered, and who makes the decision on the request.

Subsection (b) includes the term "journalistic." This term is not defined in the model policy. A state or court adopting an access rule should consider addressing this issue. Given the ease of "publishing" information on the Internet, the term may have broad application. However, any concern may be diminished by the reference to section 4.50(c) regarding use of the information, and protections provided for individual identifying information.

One issue not addressed in this section is what can be done to keep the information released in bulk in sync with the information in the court's record. One option would be to make the requestor receiving information by bulk distribution responsible for the currency and accuracy of any information before making it accessible to clients or the public. Alternatively, the information provider could be required to inform the clients or public of the limitations of the data. Another option would be for courts to refuse to continue supplying bulk data to a certain organization, or on a certain subject, if abuses occur regarding maintenance of accuracy or currency. Conversely, the court could 'certify' entities or individuals to receive bulk data based on compliance with certain practices that improved the accuracy and currency of the information they receive and the accuracy of linking the information with information from other sources. An alternative approach would be to strengthen or establish liability on the part of the information provider for errors or omissions in the information, or for disseminating information that is no longer publicly available from the court. Having obtained the information from the government would not be a defense. However, analyzing and proposing language for this sort of liability is beyond the scope of this policy.

Another concern with release of bulk data is the extent to which the electronic records are an atypical subset of data from all court records. The skewing arises from what is available in electronic form, versus paper form. As electronic versions of information start to become available, it generally is only in complex cases or a certain class of cases. The bulk data from the electronic record may, therefore, not be representative of all cases. Skewing could also be due to the fact that very little information prior to a certain date is available in electronic form. If scanning or other conversion into electronic form is not done for historical records, then the electronic record will only be the recent cases or only the newer information in older cases.

Another consideration in the nature of bulk release allowed is that a "dump" of the information in electronic form creates a snapshot of the information, whereas the database from which the information is extracted is dynamic, constantly changing and growing.

Section 4.50 - ACCESS TO COMPILED INFORMATION FROM COURT RECORDS

(a) Compiled information is defined as information that is derived from the selection, aggregation or manipulation by the court of the information from more than one individual court record, including statistical reports, and which information is not already available in an existing report.

(b) Compiled information not already available pursuant to section 4.70 may be requested by any individual for scholarly, journalistic, political, governmental, research, evaluation, statistical purposes or for the preparation of a case. The request shall 1) identify what information is sought, and 2) explain provisions for the secure protection of any data that is confidential (for example using physical locks, computer passwords and/or encryption). Providing compiled information in this circumstance will not interfere with the normal operations of the court.

(c) If the request is granted, the requestor must sign a declaration that:
(1) the data will not be sold or otherwise distributed, directly or indirectly, to third parties, except for journalistic purposes,
(2) the information will not be used directly or indirectly to sell a product or service to an individual or the general public, except for journalistic purposes, and
(3) there will be no copying or duplication of information or data provided other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.

Commentary

This section authorizes access to compiled information. Compiled information is different from case specific access because it involves more than one case. Compiled information is different from bulk access in that the information has been manipulated or aggregated and is not just a copy of the information in the court record. The section describes how the compiled information is requested, and the requirements of obtaining and using the information.

The primary interests served by release of compiled information relate to the role of the judiciary and the accountability of the judiciary. Compiled data allows analysis and comparison of court decisions across cases, across judges and across courts. This information can educate the public about the judicial process. It can also provide guidance to individuals in the conduct of their everyday life and business. Although some judges may have legitimate concerns about misuse of compiled data comparing judges, such an analysis is one approach to monitoring the performance of the judiciary.

Compiled data also allows the study of the effectiveness of the judiciary and the laws enforced in courts. For example, the studies of delay reduction leading to improved

case management and faster case processing times were based on analysis of thousands of cases in over a hundred courts across the country.

The reference to section 4.70 in subsection (b) is intended to avoid the need for requests for some types of compiled data that are already routinely prepared and made public. Party name indices, or a screen that reports the results of a name search of either civil or criminal cases, are examples.

One concern with the distribution of compiled data is the interpretation of the data. Analysis of the data without an understanding of the meaning of the data elements or codes used, or without an understanding the limitations of the data, can result in conclusions not substantiated by the data. To some extent this can be addressed by explanatory information provided with the distribution of the compiled information. There are two issues here. One is the courts may not be asked to help recipients of compiled data understand and verify the data. The other issue is enforcement of restrictions on the use or dissemination of information provided. One option is for courts to refuse to continue supplying compiled data to a certain organization, or on a certain subject, if abuses occur. Another option is to create, or strengthen, penalties for the release of information to which access is restricted under this policy.

Another concern with release of compiled data is the extent to which the electronic records are an atypical subset of data from all court records. The skewing arises from what is available in electronic form, versus paper form. As electronic versions of information became more available, it is generally only in complex cases or a certain class of cases. Compiled data from the electronic record may, therefore, not be representative of all cases. Skewing could also be due to the fact that very little information prior to a certain date is available in electronic form. If historical records are not scanned or otherwise converted into electronic form, the electronic records will only be recent cases or newer information in older cases. There are no obvious ways to avoid this problem, assuming the cost of producing electronic versions of all existing records is prohibitive.

Another consideration in the release of compiled information is that the extracted set of information is a snapshot of the information, whereas the database from which the information is extracted is dynamic, constantly changing and growing.

A state or court's policy might also consider a requirement of a nondisclosure agreement that includes injunctive relief and indemnities. In order to get a court order releasing the information the appropriate nondisclosure agreement must be signed by the requestor.

Section 4.60 – REQUESTS TO EXCLUDE INFORMATION IN COURT RECORDS FROM PUBLIC ACCESS OR OBTAIN ACCESS TO EXCLUDED INFORMATION

(a) A request to restrict access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own initiative. Based upon good cause shown, the court may restrict public access to the information if it finds that:

(1) the risk of harm to the individual;
(2) the individual's privacy rights and interests;
(3) the risk of disclosure of protected proprietary business information; or
(4) the burden to the ongoing business of the judiciary of providing access;

outweighs the public interest in:

(5) maximum public access to court records;
(6) an effective judiciary;
(7) governmental accountability;
(8) public safety;
(9) use of the courts to resolve disputes;
(10) effective use of court staff; and
(11) quality of customer service.

(b) A request to obtain access to information in a court record that is restricted or limited by this policy may be made by any member of the public. Based upon good cause shown, the court may order public access if it finds that the public interest in:

(1) maximum public access to court records;
(2) an effective judiciary;
(3) governmental accountability;
(4) public safety;
(5) use of the courts to resolve disputes;
(6) effective use of court staff; or
(7) quality of customer service

outweighs:

(8) the risk of harm to an individual;
(9) an individual's privacy rights and interests;
(10) the risk of disclosure of protected proprietary business information; or
(11) the burden to the ongoing business of the judiciary of providing access.

(c) The application of the policy involves a balancing of these factors. The factors are not co-equal, but no one factor overrides all of the others in any circumstance.

(d) The request shall be made by a written motion to the court. The requestor will give notice to all parties in the case. The court may require notice to be given by the requestor or another party to any individuals or entities identified in the information that is the subject of the request. When the request is for access to information to which access was previously restricted under section 4.60(a), the court will provide notice to the individual or entity that requested that access be restricted either itself or by directing a party to give the notice .

(e) In restricting or granting access the court will use the least restrictive means to achieve the purposes of this access policy.

Commentary

This section lays out the basic considerations and processes for restricting access to otherwise publicly available information, or opening access to restricted information. It incorporates all of the policies from section 1.00 the court must consider in deciding whether to restrict or provide public access. It also specifies the mechanism for making the request and directs the court to use the least restrictive approach possible when limiting public access.

Subsection (a) allows anyone who is identified in the court record to request restriction of public access. This specification is quite broad, including a witness in a case or someone about whom personally identifiable information is present in the court record, but who is not a party to the action. While the reach of the policy is quite broad, this is required to meet the intent of subsection 1.00 (a)(8) regarding protection of individual privacy rights and interests, not just the privacy of parties to a case. Protection is available for someone who is referred to in the case, but does not have the options or protections a party to the case would have.

Subsection (a) provides only for restricting access to information, not restricting access to the existence of the information. Section 4.10(b) specifically provides that the existence of restricted information will be publicly accessible. A state or court considering adoption of an access policy should consider whether to expand this subsection to also allow restricting access to the existence of restricted information.

Subsection (a) does not have any restrictions regarding when the request can be made, implying it can be done at any time. There is an issue about what access is permitted between the time a request to restrict access is made and the court ruling on the request. This is particularly critical if the request is made simultaneously with the filing of the information. The issue is more complicated with an electronic filing system where the information arrives in electronic form and the clerk must decide whether to accept the filing. A state or court considering adoption of an access policy might consider adding a provision that access will be restricted to the extent requested during the time a request is pending before the court. In order to avoid the use of such a provision to achieve at least

temporary restriction a court should establish procedures that provide for prompt consideration of a request to restrict access.

Subsection (b) provides that "any member of the public" can make the request for access to restricted information. This term is defined broadly in section 2.00, and includes the media and business entities as well as the public.

Subsection (c) states the premise that the interests and public policy decisions spelled out in section 1.00 and restated in this section are all entitled to some weight, and that no one public policy overrides all others in every situation. At the same time it recognizes that in any particular situation not all of the interests are relevant or co-equal in significance.

Subsection (d) contemplates a written motion seeking to restrict, or gain, access. Although a motion is specified, the section is silent as to the need for oral argument or testimony, leaving this up to the court. Notice is required to be given to all parties by the requestor. The subsection gives the court discretion to require notice to be given to others identified in the information that is the subject of the request. If public access to the information was restricted by a prior request, the subsection requires the court to arrange for notice to be given to the person who made the prior request. No appeal process is specified in the policy, as the normal appeal process for a judicial decision is assumed to apply.

Subsection (e) requires the court to seek an approach that minimizes the amount of information that cannot be accessed. This is directed at the issue of what to do about a document or other material in the court record that contains some personal or proprietary information to which access should be restricted along with other information not invoking public access concerns. The issue becomes one of whether it is technically possible to redact some information from a document and to allow the balance of the document to be publicly available. Less restrictive methods include redaction of pieces of information in the record, sealing of only certain pages of a document, as opposed to the entire document, sealing of a document, but not the entire file, or providing the information only to the requestor, not the public generally. As noted previously (see commentary under section 3.20) newer technologies permit tagging of information in an electronic records in a way that readily allows electronic redaction of pieces of information in an electronic document, and courts are encouraged to obtain this capability when acquiring new systems.

In addition to whether it is technically possible, there may be an issue of whether it is feasible to redact information in a record, and whether the court or clerks has the resources to do so. The work needed to exhaustively review a large file or document to find information to be redacted may be practically impossible, such that access to the whole file or document would be restricted, rather than attempting redaction.

Section 4.70 – COURT RECORDS IN ELECTRONIC FORM PRESUMPTIVELY SUBJECT TO REMOTE ACCESS BY THE PUBLIC

The following information in court records should be made remotely accessible to the public if it exists in electronic form, unless excluded from public access pursuant to section 4.30:

- **(a) Litigant/party indexes to cases filed with the court;**
- **(b) New case filings, including the names of the parties;**
- **(c) Register of actions showing what documents have been filed in a case;**
- **(d) Calendars of court proceedings, including the case number and caption, date and time of hearing, and location of hearing;**
- **(e) Final judgments, orders, or decrees in a case;**
- **(f) Court orders, judgment, decrees, or liens affecting title to real property.**

Commentary

Several types of information in court records have traditionally been given wider distribution than merely making them publicly accessible at the courthouse. Typical examples are listed in this section. Often this information is regularly published in newspapers, particularly legal papers. Many early automated case management systems included a capability to make this information available electronically, at least on computer terminals in the courthouse, or through dial-up connections. Similarly, courts have long prepared registers of action that indicate for each case what documents or other materials have been filed in the case. Again, early case management systems often automated this function. The summary or general nature of the information is such that there is little risk of harm to an individual or undue invasion of privacy or proprietary business interests. This section of the policy acknowledges and encourages this public distribution practice by making these records presumptively accessible remotely, particularly if they are in electronic form. While not every court, or every automated system, is capable of providing this type of access, courts are encouraged to develop the capability.

Making certain types of information remotely accessible allows the court to make cost effective use of public resources provided for its operation. If the information is not available, someone requesting the information will have to call the court or come down to the courthouse and request the information. Public resources will be consumed with court staff locating case files containing the record or information, providing it to the requestor, and returning the case file to the shelf. If the requestor can obtain the information remotely, without involvement of court staff, there will be less use of court resources.

In implementing this section a court should be mindful about what specific pieces of information are made accessible remotely. Care should be taken that the release of information is consistent with all provisions of the access policy, especially regarding personal identification information. For example, the information remotely accessible

should not include information presumptively excluded from access pursuant to section 4.30. An example of calendar information that may not by accessible by law is that relating to juvenile cases, adoptions, and mental health cases (see commentary associated with section 4.30 (b)).

Subsection (e): One role of the judiciary, in resolving disputes, is to state the respective rights, obligations and interests of the parties to the dispute. This declaration of rights, obligations and interests usually is in the form of a judgment or other type of final order. Judgments or final orders have often had greater public accessibility by a statutory requirement that they be recorded in a "judgment roll" or some similar practice. One reason this is done is to simplify public access by placing all such information in one place, rather than making someone step through numerous individual case files to find them. Recognizing such practices, the policy lists this information as specifically being remotely accessible if in electronic form.

Final judgment is meant to refer to a judgment where any applicable appeal period has expired, that is, a judgment that is no longer subject to judicial change.

WHEN ACCESSIBLE

Section 5.00 – WHEN COURT RECORDS MAY BE ACCESSED

(a) Court records will be available for public access in the courthouse during hours established by the court. Court records in electronic form to which the court allows remote access under this policy will be available for access at least during the hours established by the court for access in the courthouse, subject to unexpected technical failures or normal system maintenance announced in advance, and at such other times as are technically feasible.

(b) Upon receiving a request for access to information the court will respond within a reasonable time regarding the availability of the information and provide the information within a reasonable time.

Commentary

This section of the policy specifies when court records are accessible. The policy directs, as a minimum, remote access be available at the same times as paper records are accessible. It does not preclude or require "after hours" access to court records in electronic form, although courts are encouraged to provide access to records in electronic form beyond the hours access is available at the courthouse. The section acknowledges that electronic access may occasionally not be available during normal business hours because of unexpected interruptions to information technology systems, crashes, and during planned interruptions such as for back-up of databases, software upgrades or maintenance, or hardware upgrades or maintenance.

It is not the intent of the policy to require courts to expend money or other resources to make remote access possible outside of normal business hours.

Subsection (b) addresses the question of how quickly the information will be made available. There are a number of factors that can affect how quickly the court responds to a request and provides the information, assuming it is publicly accessible. The response will be slower if the request is non-specific, is for a large amount of information, for information that is in off-site storage, or the resources needed to respond to the request. The objective is to have a prompt and timely response to a request for information.

A state or court considering adoption of an access policy should consider adding provisions designating a custodian of the record to respond to requests, particularly unusual requests (bulk data or compiled) or denials of requests. The custodian, acting as the "information steward" or ombudsperson, would be the person responsible and accountable for the implementation of the access policy. Designating a custodian would be especially important where there has been a history of problems regarding access, or denial of access. There are many roles for the custodian, from responding to requests for access, responding to denials of access, responding to requests for bulk access (under

section 4.40) or compiled access (under section 4.50), determining or reviewing fees to be charged for access, or addressing perceived delays in fulfilling requests.

Another issue that might be covered in a policy is a provision that gives litigants or the public the ability to access information in electronic form where they do not have the ability or equipment to obtain access. If information is only available in electronic form, the court should provide terminals or computers in the courthouse through which the public can obtain access, or make the information available through public libraries or other information access sites.

FEES

Section 6.00 – FEES FOR ACCESS

The court may charge a fee for access to court records in electronic form, bulk distribution or compiled information. To the extent that public access to information is provided exclusively through a vendor, the court will ensure that any fee imposed by the vendor for the cost of providing access is reasonable.

Commentary

This section recognizes that providing access to information in court records does consume court resources. Access is not without public cost. The cost of access is either absorbed by the taxpayers in funding the courts, or by those requesting access. The policy question for the court is what type and level of access should be funded by the taxpayer and at no cost to the requestor. It is assumed that any fee imposed will not be so prohibitive as to effectively deter or restrict access. The section provides that if access is provided through a vendor, any fee imposed should be reasonable.

The policy assumes the court will use existing laws and practices to determine the amount of the fee. If there are no existing provisions for determining a fee, a state or court considering adoption of an access policy should address which costs are allowable for purposes of determining the fee.

Fees for bulk access pursuant to section 4.40 or compiled access pursuant to section 4.50 which require special programming or actions because the information is not regularly available in the form requested might be calculated differently from access fees for information regularly provided to the public. One aspect of the cost could be the cost of staff time to produce a requested report where the staff are busy with court projects, and the work on the special report would be done at overtime rates. Another issue would whether to include the cost of making information available in electronic form, for example, the cost of scanning documents, where the electronic version is not needed by the court.

No provision is made in the section for waiver of any fee based on inability to pay. In most states there are provisions in existing law guiding waiver of fees, which would presumably be applicable for any access fee.

The policy is silent about whether providing access to court record can be a revenue source for the court or level of government funding the court. If the fee is greater than actual costs, state legislation may be required to charge such a fee unless the court has the authority to establish such a fee.

OBLIGATION OF VENDORS

Section 7.00 – OBLIGATIONS OF VENDORS PROVIDING INFORMATION TECHNOLOGY SUPPORT TO A COURT TO MAINTAIN COURT RECORDS

(a) If the court contracts with a vendor to provide information technology support to gather, store, or make accessible court records, the contract will require the vendor to comply with the intent and provisions of this access policy. For purposes of this section, "vendor" includes a state, county or local governmental agency that provides information technology services to a court.

(b) By contract the vendor will be required to comply with the requirement of section 8.30 to educate its employees and subcontractors about the provisions of the access policy.

(c) By contract the vendor will be required to notify the court of any requests for compiled information or bulk distribution of information, including the vendor's requests for such information for its use.

Commentary

This section is intended to deal with the common situation where information technology services are provided to a court by another agency, usually in the executive branch or with outsourcing of court information technology services to non-governmental entities. The intent is to have the policy apply regardless of who is providing the services involving court records. Implicit in this policy is the concept that court records are under the control of the judiciary, and that the judiciary has the responsibility to ensure public access to court records and to restrict access where appropriate. This is the case even if the information is maintained in systems operated by the executive branch of government, including where the clerk of court function is provided by an elected clerk or a clerk appointed by the executive or legislative branch and not the court.

"Information technology support" is meant to include a wide range of activities, including records management services or equipment, computer hardware or software, databases management, web sites, and communications services used by the court to maintain court records and provide public access to them.

Subsection (b): The requirements of the policy regarding a vendor educating its employees or subcontractors is in addition to any incentive to do so provided by the liability or indemnity provisions of applicable law or the contract or agreement with the court.

A state or court considering adopting an access policy should review applicable law regarding misuse or abuse of information by vendors, court, or clerk of court

employees so as to draft a policy that is consistent with, and supports the underlying policy of, existing liability laws.

Subsection (c): In order to be aware of issues and manage its information according to the terms of the policy, vendors should also be required to notify the court of requests for information, whether in bulk (pursuant to section 4.40) or compiled (pursuant to section 4.50).

In considering adoption of an access policy a state or court should consider whether it wants to control, through its contract with the vendor, "downstream" access and distribution of information from court records that is held or maintained by the vendor. For example, the court could require that the vendor require anyone to whom it distributes information from court records to comply with this policy, or other laws such as the Fair Credit Reporting Act.

NOTICE AND EDUCATION REGARDING ACCESS POLICY

Section 8.10 - DISSEMINATION OF INFORMATION TO LITIGANTS ABOUT ACCESS TO INFORMATION IN COURT RECORDS

The court will inform litigants that information in the court record about them is accessible to the public, including remotely.

Commentary

This section of the policy recognizes that litigants may not be aware that information provided to the court, by them or other parties in the case, may be accessible to the public. Litigants may also be unaware that some of the information may be available electronically, possibly even remotely. To the extent litigants are unrepresented, this problem is even more significant, as they have no lawyer who can point this out. To address this possible ignorance this section requires a court to inform litigants about public access to court records.

Issues Not Addressed in the Policy

The policy does not specify how notice will be given, nor the extent of detail required. These issues need to be addressed by a state or court considering adoption of an access policy. There are several alternatives to accomplish this. The notice could be a written notice or pamphlet received when filing initial pleadings. The pamphlet could refer the litigant to other sources of information, including a web site. The court could also provide materials, including videotapes, through a self-help center or service, or an ombudsperson. Consideration should also be given to providing the information in several common languages. Finally, the court could encourage the local bar to assist in educating litigants. A court might also consider ways of educating the general public about access, in addition to providing information to litigants at the time a case is filed.

The section does not specifically require the court to inform litigants of the process for requesting restrictions to access. A state or court considering adoption of an access policy should consider whether to require local courts to also make available to parties information about how to request that information in their case be excluded from public access pursuant to section 4.60, and information about the realistic likelihood of obtaining restricted access to some types of information.

Section 8.20 - DISSEMINATION OF INFORMATION TO THE PUBLIC ABOUT ACCESSING COURT RECORDS

The Court will develop and disseminate information that informs the public about how to obtain access to court records pursuant to this policy.

Commentary

Public access to court records is meaningless if the public does not know how to access the records. This section establishes an obligation on the court to provide education to the public about how to access court records.

There are a number of techniques to accomplish this, and a court may use several simultaneously. Brochures can be developed explaining access. Access methods can also be explained on court web sites. Tutorials on terminals in the courthouse or on web sites can be used to instruct the public on access without the direct assistance of court or clerk's office personnel.

Subjects the public could be informed about include: 1) why court records are open, 2) where and how to obtain access, 3) when access is available, 4) how to request access to restricted information, whether restricted categorically or by specific court order, and the criteria the court will consider to allow access, 5) how to request restriction of access and the criteria the court will use to restrict access, 6) requests for bulk or compiled information, 7) possible fees for obtaining access or copies, and 8) consequences for misuse or abuse of access.

Section 8.30 – EDUCATION OF COURT EMPLOYEES ABOUT THE ACCESS POLICY

The Court and clerk of court will educate and train their employees to comply with this policy so that Court and clerk of court employees respond to requests for access to court information in a manner consistent with this policy.

Commentary

This section mandates that the court and clerk of court educate and train their employees to be able to properly implement the access policy. Properly trained employees will provide better customer service, facilitating access when appropriate, and preventing access when access is restricted. When properly trained, there is also less risk of inappropriate disclosure, thereby protecting privacy and lowering risk to individuals from disclosure of sensitive information. Training should also be provided to employees of other agencies, or their contractors, who have access to information in court records, for example as part of shared integrated criminal justice information systems.

One concern about court records is that the information in the records is accurate, timely, and not ambiguous. The problem exists equally with paper court records and court records in electronic form, but the possibility of broad scale access to electronic records heightens the risk. This risk is minimized if the court's practices for generating and maintaining the court record are sound, and the employees are well trained in the practices.

The specifics of what courts should instruct employees about is not included in this access policy. Suggested subjects include at least the following: 1) intent of the policy, 2) access and restriction provisions, governing employees of other public entities as well as the public, 3) appropriate response to requests for access, 4) process for requesting access or requesting restriction to access, 5) fees, 6) importance of timely and accurate data entry, and 7) consequences for misuse or abuse of access or improper release of restricted information. A court should also adopt personnel policy provisions indicating consequences for misuse, abuse or inappropriate disclosure of information in court records.

In addressing the means of access the court or clerk of court should be mindful of complying with the Americans with Disability Act. Means of access should be developed for those who are unable to access the information in electronic form just as they should be developed for paper records.

Section 8.40 – EDUCATION ABOUT PROCESS TO CHANGE INACCURATE INFORMATION IN A COURT RECORD

The Court will inform the public of the policy by which the court will correct inaccurate information in a court record relating to him or her.

Commentary

Court records are as susceptible to errors or incomplete information as any other public record. This section assumes that courts have a rule, or there is a statute, specifying a method for reviewing information in court records and making any changes or additions that will make the record more accurate or complete. This section requires the court to inform the public of the policy.

The policy does not provide a standard for when information must be changed or supplemented. It is not the intent of the policy as drafted to create a method for modifying a court record beyond the existing procedures for introducing and challenging evidence or other information that is part of the court record.

The information provided to the public pursuant to this section should indicate: 1) that only a court order, not the clerk, can make the change, 2) the criteria the court will use in deciding whether to change the record, 3) the likelihood of a change being made, and 4) that there will be a record of the request for the change as well as a record of what was changed.